103

(1)

Supreme Court, U.S.
FILED

08-203 AUG 18 2008

No. 07-1328 OFFICE OF THE CLERK

In the Supreme Court of the United States

Elvis David Lewis
PETITIONER

v.

Michael B. Mukasey, Attorney General
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Randall L. Johnson, Esquire
Counsel of Record
Johnson & Associates, P.C.
1916 Wilson Boulevard, Suite 203
Arlington, Virginia 22201
Telephone (703) 516-4400
Facsimile (703) 516-9089

QUESTIONS PRESENTED

1. Whether the Department of Homeland Security proved by clear and convincing evidence that the Petitioner, an alien, falsely claimed U.S. citizenship, where the only evidence produced was a copy of the Petitioner's Form I-9, Employment Eligibility Verification, where the Petitioner checked a box next to the following printed statement: "I attest, under penalty of perjury, that I am . . . [a] citizen *or* national of the United States" (italics added).

2. Whether the Petitioner failed to exhaust his administrative remedies regarding his charge as an alien removable from the United States for falsely representing himself to be a U.S. citizen where the Petitioner litigated this claim before an immigration judge and the Board of Immigration Appeals.

3. Whether the Petitioner failed to show the requisite prejudice resulting from a procedural due process violation where an immigration judge precluded him from presenting evidence concerning his attempt to adjust his status to that of a legal permanent resident and this denial negatively impacted the results of the proceeding.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties to the proceeding in Court whose judgment is sought to be reviewed.

Petitioner is Elvis David Lewis.

Respondent is Michael B. Mukasey, Attorney General.

CORPORATE DISCLOSURE STATEMENT

As this case does not involve any business entity, there is no parent corporation or publicly held company that owns 10% or more of a relevant corporation's stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

PARTIES TO THE PROCEEDING.....ii

CORPORATE DISCLOSURE STATEMENT.....ii

TABLE OF CONTENTS.....iii

TABLE OF CITED AUTHORITIES.....vi

OPINIONS BELOW.....1

JURISDICTION.....2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....3

STATEMENT OF THE CASE.....3

A. Statutory Framework.....4

B. Factual Background.....5

REASONS FOR GRANTING THE PETITION.....10

I. The Department of Homeland Security Failed to Prove by Clear and Convincing Evidence That Mr. Lewis Was Removable for Falsely Claiming U.S. Citizenship.....12

TABLE OF CONTENTS - *Continued*

II. Mr. Lewis Exhausted His Administrative Remedies Before Seeking Judicial Review of the Board of Immigration Appeals' Decision before the United States Court of Appeals for the Fourth Circuit.....18

III. Mr. Lewis Showed the Requisite Prejudice Resulting from a Procedural Due Process Violation Because the Immigration Judge's Preclusion of Evidence Negatively Impacted the Results of the Proceeding.....22

CONCLUSION.....26

APPENDIX A - Decision of the Fourth Circuit Denying Rehearing (May 19, 2008).....1a

APPENDIX B - Decision of the Fourth Circuit Denying Petition for Review (January 29, 2008).....2a

APPENDIX C - Decision of the BIA Denying Motion to Remand and Dismissing Appeal...4a

APPENDIX D - Decision of the Immigration Judge Denying All Applications for Relief.....8a

TABLE OF CONTENTS - *Continued*

APPENDIX E - 8 U.S.C. § 1182(h).....17a

APPENDIX F - 8 U.S.C. § 1227(a)(3)(D).....20a

APPENDIX G - 8 U.S.C. § 1252(d)(1).....21a

APPENDIX H - 8 U.S.C. § 1255.....22a

APPENDIX I - 18 U.S.C. § 911.....40a

TABLE OF CITED AUTHORITIES

The Constitution of the United States:

U.S. CONST. amend V.....3

Cases:

Barry v. Barchi,
443 U.S. 55 (1979).....21

Gibson v. Berryhill,
411 U.S. 564 (1973).....20

Kechkar v. Gonzales,
500 F.3d 1080 (10th Cir. 2007).....3,11,17,18

Landon v. Plasencia,
459 U.S. 21 (1982).....21

Matthews v. Eldridge,
424 U.S. 319 (1976).....23

McCarthy v. Madigan,
503 U.S. 140 (1992).....19,20

Rodriguez v. Mukasey,
519 F.3d 773 (8th Cir. 2008).....3,16,17

Rusu v. INS,
296 F.3d 316 (4th Cir. 2002).....9,13

TABLE OF CITED AUTHORITIES - *Continued*

Theodros v. Gonzales,
490 F.3d 396 (5th Cir. 2007).....3,11,18

U. S. v. Karaouni,
379 F.3d 1139 (9th Cir. 2004).....3,10,13,14,15

Woodby v. INS,
385 U.S. 276 (1966).....13

Statutes:

8 U.S.C. § 1182.....4

8 U.S.C. § 1182(h).....4,5,6,7,9,12,23,24

8 U.S.C. § 1227(a)(3)(D).....4,6,15,16,17,18

8 U.S.C. § 1229a(c)(3)(A).....13

8 U.S.C. § 1229c(b).....6

8 U.S.C. § 1252(d)(1).....9,19

8 U.S.C. § 1255.....4,24

18 U.S.C. § 911.....13,15

28 U.S.C. §1254(1).....2

IIRIRA § 344(c).....4

In the Supreme Court of the United States

No. 07-1328

Elvis David Lewis
PETITIONER

v.

Michael B. Mukasey, Attorney General
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Elvis David Lewis, by counsel, respectfully petitions for a writ of certiorari to review the May 19, 2008 order of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals denying the Petitioner's petition for rehearing, dated May 19, 2008, is unreported. (App. A, *infra*, 1a). The judgment of the court of appeals denying the Petitioner's petition for review, dated January 29, 2008, is unreported. (App. B, *infra*, 2a-3a) The

order of the Board of Immigration Appeals, dated March 22, 2007, is unreported. (App. C, *infra*, 4a-5a). The order of the immigration judge, dated September 12, 2005, is unreported. (App. D, *infra*, 6a-9a).

JURISDICTION

The judgment of the court of appeals was entered on January 29, 2008.(App. B, *infra*, 2a-3a) . A petition for rehearing was denied on May 19, 2008. (App. A, *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Constitution provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

Pursuant to S.C. Rule 14.1(f), the pertinent text of various sections of the Immigration and Nationality Act of 1952, as amended, shall be set out in the appendix to this petition.

STATEMENT OF THE CASE

An alien that falsely claims U.S. citizenship for any purpose or benefit under the Immigration and Nationality Act or any federal or state law is removable. Furthermore, there is no waiver for this ground of removability, so an alien found to have falsely claimed U.S. citizenship is permanently barred from adjusting his status to that of a legal permanent resident. This case considers whether an alien falsely claims U.S. citizenship by checking a box on a form that asserts that he is *either* a U.S. citizen *or* national. A split exists between the circuit courts that have considered the matter.[1]

---

[1] *Rodriguez v. Mukasey*, 519 F.3d 773 (8th Cir. 2008); *Kechkar v. Gonzales*, 500 F.3d 1080 (10th Cir. 2007); *Theodros v. Gonzales*, 490 F.3d 396 (5th Cir. 2007); and *U.S. v. Karaouni*, 379 F.3d 1139 (9th Cir. 2004).

I. Statutory Framework

8 U.S.C. § 1227(a)(3)(D)(i) provides that an alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under the Immigration and Nationality Act or any federal or state law is deportable. This section applies to representations made on or after September 30, 1996, pursuant to section 344(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). 8 U.S.C. § 1227(a)(3)(D)(ii) provides the only exception to this ground of removability. Under this exception, an alien who falsely claims U.S. citizenship will not be subject to deportation if: (1) his parents were or are U.S. citizens; (2) he permanently resided in the United States prior to attaining the age of 16; and (3) he reasonably believed at the time of making such representations that he was a U.S. citizen.
8 U.S.C. § 1255 permits a nonimmigrant to adjust his status to that of a legal permanent resident if (1) the alien applies for such adjustment; (2) the alien is eligible to receive an immigrant visa (i.e., the alien is the beneficiary of an approved visa petition); (3) the alien is admissible to the United States for permanent residence; and (4) an immigrant visa is immediately available to the alien at the time his application is filed.

8 U.S.C. § 1182 provides numerous grounds for finding an alien inadmissible to the United

States. These grounds range from health- to criminal-related reasons for denying an alien admission to the United States. An alien found to be inadmissible may apply for a waiver of his corresponding grounds of inadmissibility.

8 U.S.C. § 1182(h) is an example of one such waiver. Under this section, the Attorney General may, in his discretion, waive certain criminal grounds of an alien's inadmissibility. Two of the various factors that the Attorney General considers in making this determination are (1) whether the alien has been rehabilitated; and (2) whether the alien's denial of admission would result in extreme hardship to a U.S. citizen spouse or child. It is important to note, however, that a § 1182(h) waiver does not provide relief for an alien found to have falsely claimed U.S. citizenship.

II. Factual Background

Elvis David Lewis is a native and citizen of Grenada who entered the United States in February of 1981 as a nonimmigrant visitor for business. Although only authorized to stay in this country for one month, Mr. Lewis remained beyond that time. In 1999, the legacy Immigration and Naturalization Service ("INS")[2] placed him in removal proceedings.

---

[2] On March 1, 2003, the INS became part of the Department of Homeland Security ("DHS") under the Department of Homeland Security Act of 2002, Pub. L. No. 107-296, Title IV, 116 Stat. 2135 (Nov. 25, 2002).

Mr. Lewis was charged with removability, *inter alia*, under 8 U.S.C. § 1227(a)(3)(D) as an alien that falsely represented himself to be a citizen of the United States for seeking and obtaining employment by attesting under penalty of perjury on a Form I-9, Employment Eligibility Verification, dated July 15, 1997, that he was a U.S. citizen or national.

Mr. Lewis conceded all of the charges of removability against him except the claim of false representation as a U. S. citizen, which he neither admitted nor denied. Mr. Lewis sought relief from removal in the form of adjustment of status under 8 U.S.C. § 1255, a waiver of his criminal grounds of inadmissibility under 8 U.S.C. § 1182(h), and–in the alternative–voluntary departure under 8 U.S.C. § 1229c(b). The basis of Mr. Lewis's original claim for adjustment of status was that he was the beneficiary of an approved visa petition filed by his U.S. citizen daughter.

On June 25, 2002, the immigration judge ("IJ") found Mr. Lewis removable as charged as an alien that had falsely represented himself to be a U.S. citizen. Finding that his U.S. citizen daughter would not suffer extreme hardship if he were removed from the United States, the IJ denied Mr. Lewis's application for a 8 U.S.C. § 1182(h) waiver of his criminal grounds of inadmissibility. Consequently, the IJ found Mr. Lewis inadmissible and therefore statutorily ineligible to adjust his status. Finally, the IJ found Mr. Lewis statutorily ineligible for voluntary departure and ordered him removed to Grenada.

In July of 2002, Mr. Lewis filed a motion to

reconsider, which the IJ granted on August 13, 2002. On July 25, 2002, Mr. Lewis also filed a Notice of Appeal with the Board of Immigration Appeals ("BIA"). Later, on August 23, 2002, Mr. Lewis filed a motion to withdraw the appeal. Noting that Mr. Lewis had withdrawn his appeal, the BIA returned the record to the immigration court. On March 24, 2003, the IJ administratively closed Mr. Lewis's proceedings because he had married a U.S. citizen, had an approved visa petition, and appeared eligible for adjustment of status. In March of 2004, Mr. Lewis filed a motion to recalendar his removal proceedings, asserting his eligibility for adjustment of status as the beneficiary of an approved visa petition filed by his U.S. citizen wife. At a hearing conducted on March 1, 2005, Mr. Lewis, his U.S. citizen wife, and his U.S. citizen child were prepared to present evidence in support of Mr. Lewis's application for a 8 U.S.C. § 1182(h) waiver. Specifically, Mr. Lewis and his family were prepared to testify regarding his rehabilitation as well as the extreme hardship his U.S. citizen family would face if he were ordered removed from the United States. However, the IJ precluded Mr. Lewis and his family from presenting this evidence on the basis that Mr. Lewis falsely claimed U.S. citizenship, and without a waiver for this charge of inadmissibility, presenting evidence in support of his application for a 8 U.S.C. § 1182(h) waiver was meaningless because Mr. Lewis was already statutorily barred from adjusting his status. Accordingly, Mr. Lewis contested the IJ's previous finding that he had falsely claimed U.S. citizenship. In response, the IJ ordered the parties

to file briefs discussing the availability of any waivers in Mr. Lewis's case. On March 31, 2005, Mr. Lewis filed a motion in support of his adjustment of status claim. On June 29, 2005, the DHS filed its response opposing Mr. Lewis's request for a waiver. In a decision rendered on September 12, 2005, the IJ denied Mr. Lewis's applications for relief from removal. Specifically, the IJ found Mr. Lewis statutorily ineligible for adjustment of status because, without a waiver for falsely claiming U.S. citizenship, Mr. Lewis was inadmissible to the United States. The IJ found that, regardless of whether or not his criminal grounds of inadmissibility were waived, Mr. Lewis had falsely claimed to be a U.S. citizen and was therefore barred from adjusting his status. The IJ also found Mr. Lewis to be statutorily ineligible for cancellation of removal because of the false citizenship claim, coupled with his finding that Mr. Lewis was not a person of good moral character. Finally, the IJ denied Mr. Lewis's application for voluntary departure based on his determination that Mr. Lewis was an aggravated felon. Mr. Lewis timely filed an appeal of the IJ's decision, as well as a motion for remand, with the BIA.

In his brief to the BIA, Mr. Lewis argued that he neither admitted nor denied the charge of falsely claiming U.S. citizenship. Furthermore, he implicitly argued that the DHS failed to meet its burden that he was removable for falsely claiming U.S. citizenship by merely submitting a copy of his Form I-9, Employment Eligibility Verification. On March 22, 2007, the BIA denied Mr. Lewis's

motion for remand and dismissed his appeal. The Board found that Mr. Lewis failed to address the IJ's finding the he was ineligible to seek a waiver of the charge of falsely claiming U.S. citizenship. The BIA went on to say that Mr. Lewis, without obtaining a waiver of this ground of inadmissibility, was ineligible to adjust his status. The BIA thereby concluded that the IJ did not err in precluding the presentation of evidence in support of his application for a 8 U.S.C. § 1182(h) waiver at the 2005 hearings. Mr. Lewis timely filed a petition for review with the U.S. Court of Appeals for the Fourth Circuit ("Fourth Circuit") seeking judicial review of the BIA's decision.

In his petition for review, Mr. Lewis asserted that the BIA erred in finding that he never contested this ground of removability on appeal. Mr. Lewis also asserted that his rights to due process were violated when the IJ precluded the presentation of evidence of rehabilitation at the 2005 hearings. On January 29, 2008, the Fourth Circuit dismissed in part and denied in part Mr. Lewis's petition for review. The Fourth Circuit found that Mr. Lewis had not exhausted administrative remedies with respect to the charge of falsely claiming U.S. citizenship by failing to raise this issue on appeal to the BIA. Accordingly, the Fourth Circuit claimed it lacked jurisdiction to review this "unexhausted" claim pursuant to 8 U.S.C. § 1252(d)(1). Citing *Rusu v. INS*, the Fourth Circuit also found that Mr. Lewis could not succeed with his due process claim because he failed to show the requisite prejudice resulting from the alleged error. *See Rusu v. INS*, 296 F.3d

316, 320-21 (4th Cir. 2002) (court may only find prejudice when the rights of an alien have been transgressed in such a way as is likely to impact the results of the proceedings). Mr. Lewis timely filed a petition for rehearing.

In his petition for rehearing, Mr. Lewis argued that he did in fact exhaust his administrative remedies by challenging the IJ's finding that he had falsely claimed U.S. citizenship to the BIA. In the alternative, Mr. Lewis argued that the Fourth Circuit may still review the BIA's order, despite his failure to exhaust administrative remedies, because Mr. Lewis's interest in retaining prompt access to a federal judicial forum outweighed the countervailing institutional interests favoring exhaustion. Mr. Lewis also specifically noted that a Ninth Circuit case, *U.S. v. Karaouni*, 379 F.3d 1139 (9th Cir. 2004), established that checking the box on Form I-9 attesting that one is *either* a U.S. citizen *or* national does not prove beyond a reasonable doubt that an alien is falsely claiming U.S. citizenship. Nevertheless, on May 19, 2008, the Fourth Circuit denied, without any explanation, Mr. Lewis's petition for rehearing.

REASONS FOR GRANTING THE PETITION

In order to document that they are authorized to work in the United States, all employees, citizens and non-citizens, hired after November 6, 1986 must complete a Form I-9, Employment Eligibility Verification. On this form, a person must check a box attesting, under penalty of perjury, that he is

one of the following: (1) a citizen *or* national of the United States; (2) a lawful permanent resident; or (3) an alien authorized to work. U.S. immigration law permanently bars an alien from adjusting his status to that of a legal permanent resident if he is found to have falsely claimed U.S. citizenship. U.S. criminal law makes it a federal crime to falsely claim U.S. citizenship. The United States Court of Appeals for the Fourth Circuit has, in effect, found that an alien who checked a box stating that he was *either* a citizen *or* national of the United States has falsely claimed U.S. citizenship and is permanently barred from adjusting his status to that of a legal permanent resident. The United States Court of Appeals for the Ninth Circuit has found, however, that an alien who checked the same box on Form I-9, attesting that he was *either* a citizen *or* national of the United States, cannot be convicted of the federal crime of falsely claiming U.S. citizenship. In the civil context, other circuits of United States courts of appeals have entered decisions that fall somewhere in between these two extremes.[3] Therefore, this Court should grant this petition for a writ of certiorari because a United States court of appeals has entered a decision in conflict with a decision of another United States court of appeals on the same important matter. Furthermore, because the Fourth Circuit has sanctioned a lower court's departure from the accepted and usual course of judicial proceedings

---

[3] *See Rodriguez v. Mukasey*, 519 F.3d 773 (8th Cir. 2008); *Kechkar v. Gonzales*, 500 F.3d 1080 (10th Cir. 2007); and *Theodros v. Gonzales*, 490 F.3d 396 (5th Cir. 2007).

with regards to burdens of proof, this Court should exercise its supervisory authority to correct this error and ensure that all persons within the United States are afforded due process of law.

I. The Department of Homeland Security Failed to Prove by Clear and Convincing Evidence That Mr. Lewis Was Removable for Falsely Claiming U.S. Citizenship

The Fourth Circuit committed legal reversible error by implicitly finding that the BIA properly upheld the IJ's determination that Mr. Lewis falsely claimed U.S. citizenship. In its January 29, 2008 decision, the Fourth Circuit asserted that Mr. Lewis failed to exhaust his administrative remedies before the BIA and it therefore lacked jurisdiction to review his claim. As will be discussed in more detail in section II of this petition, Mr. Lewis did in fact exhaust his administrative remedies or, in the alternative, was not required to exhaust his administrative remedies, before seeking judicial review of the BIA's order before the Fourth Circuit. Thus, by claiming it lacked jurisdiction to review his claim when jurisdiction could have indeed lied, the Fourth Circuit implicitly found that the BIA properly upheld the IJ's determination that Mr. Lewis was removable for falsely claiming U.S. citizenship. This argument is bolstered by the fact that the Fourth Circuit also found that Mr. Lewis could not succeed with his due process claim regarding the preclusion of his evidence in support of a 8 U.S.C. § 1182(h) waiver because he failed to show the requisite

prejudice resulting from the alleged error. As will be discussed more in section III of this petition, the requisite prejudice is that an alien's rights must have been transgressed in such a way as is likely to impact the results of the proceedings. *See Rusu v. INS*, 296 F.3d 316, 320-21 (4th Cir. 2002) . The BIA determined that, absent a waiver of a false claim to U.S. citizenship, evidence in support of waiving other grounds of inadmissibility would not impact the ultimate decision denying Mr. Lewis's applications for relief. Thus, the Fourth Circuit's finding that Mr. Lewis cannot show the requisite prejudice of his procedural due process violations more explicitly suggests that it approved of the BIA's decision upholding the IJ's finding by clear and convincing evidence that Mr. Lewis falsely claimed U.S. citizenship.

In removal proceedings, the DHS has the burden of establishing by "clear, unequivocal, and convincing evidence" that, in the case of an alien who has been admitted to the United States, the alien is deportable. *Woodby v. INS*, 385 U.S. 276, 286 (1966); 8 U.S.C. § 1229 (c)(3)(A). No decision shall be valid unless it is based upon reasonable, substantial, and probative evidence. 8 U.S.C. § 1229(c)(3)(A).

In *U. S. v. Karaouni*, the Ninth Circuit held that a defendant who checked a box attesting that he was *either* a citizen *or* national of the United States could not be convicted under 18 U.S.C. § 911, a federal statute that makes it a crime only to make a false claim to U.S.

citizenship. *U. S. v. Karaouni*, 379 F.3d 1139 (9th Cir. 2004). The Ninth Circuit reasoned that the use of the disjunctive "or" suggests that terms in a sequence should not be interpreted as synonyms, and therefore the government had not proved beyond a reasonable doubt that the defendant falsely claimed U.S. citizenship. *Karaouni*, 379 F.3d at 1142. Indeed, as the defendant argued, by checking the box next to the printed statement, which the government presumably drafted with care, he merely claimed that he was a citizen *or* national, not that he was a citizen and not that he was a citizen *and* a national. *Id.* The Ninth Circuit continued by noting that

> "the syntactic distinction is critical because the legal definitions of U.S. national and U.S. citizen are not synonymous. All citizens of the United States are nationals, but some nationals, such as persons born in American Samoa and other U.S. territorial possessions, are not citizens. 8 U.S.C. § 1408; *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 967-69 (9th Cir. 2003). Indeed, the term 'national of the United States' is defined as including 'a person who, though not a citizen of the United States, owes permanent allegiance to the United States.' 8 U.S.C. § 1101(a)(22). Thus, a claim to be a U.S. national is not a claim to be a citizen, but a claim to be a member of a

broader group that includes citizens as well as others." *Id.* at 1142-43.

In the case at bar, Mr. Lewis was admitted to the United States as a nonimmigrant visitor for business at New York, New York in February of 1981. Thus, the DHS had the burden of establishing by clear, unequivocal, and convincing evidence that Mr. Lewis was deportable for falsely claiming U.S. citizenship. Like 18 U.S.C. § 911, a plain reading of 8 U.S.C. § 1227(a)(3)(D) shows beyond any question that the provision only covers false claims of U.S. citizenship and not false claims of U.S. nationality. Thus, by merely submitting a copy of Mr. Lewis's Form I-9, where he checked the same box as the defendant in *Karaouni*, the DHS failed to *unequivocally* establish that Mr. Lewis is removable under 8 U.S.C. § 1227(a)(3)(D) for falsely claiming U.S. citizenship. Indeed, Mr. Lewis may have claimed to be a national of the United States; a claim of U.S. nationality, although false, is not a violation of the INA. Therefore, the Fourth Circuit sanctioned the BIA's violation of a basic principle of immigration law by allowing the government to prove that an individual committed the charged offense by showing that he committed either that offense or some other act. Because Mr. Lewis merely attested on the Form I-9 that he was either a U.S. citizen or national, and a claim of U.S. nationality, even if false, does not violate 8 U.S.C. § 1227(a)(3)(D), this Court should reverse the Fourth Circuit's implicit determination that Mr. Lewis is removable as charged under 8 U.S.C. § 1227

(a)(3)(D).

The Fourth Circuit seems to be saying that a statement from which U.S. citizenship might be inferred is sufficient to support a finding that an alien has represented himself to be a U.S. citizen. The Ninth Circuit clearly states that only a direct representation of U.S. citizenship will suffice. In *Rodriguez v. Mukasey*, the Eighth Circuit noted that

> "Form I-9 is poorly designed in that by checking one box the person ambiguously represents that he is either a citizen or national. Therefore, the evidence must support a finding that the alien marked the 'citizen or national of the United States' box on a form I-9 *with the purpose of representing himself as a citizen, not a national.*" *Rodriguez v. Mukasey*, 519 F.3d 773, 776-78 (8th Cir. 2008) (italics added).

Thus, the Eight Circuit places itself on some middle ground between the Fourth and Ninth Circuits' decisions. Unlike the Fourth Circuit, the Eighth Circuit has determined that checking a box attesting to be *either* a citizen *or* national of the United States is not enough to find an alien removable for falsely claiming U.S. citizenship under 8 U.S.C. § 1227(a)(3)(D). Rather, in order to be found removable by clear and convincing evidence, the DHS must prove that the alien marked the "citizen or national of the United States" box with *the*

purpose of representing himself as a citizen. The Eighth Circuit found the alien had represented himself as a U.S. citizen, as opposed to a U.S. national, based on his sworn statements from an interview that "he knew that he was 'making a claim to a government agency that [he] was a citizen of the United States.'" *Rodriguez*, 519 F.3d at 775. In the instant case, Mr. Lewis made no such statement. Indeed, Mr. Lewis neither admitted nor denied his charge of removability under 8 U.S.C. § 1227 (a)(3)(D). Thus, under the Eighth Circuit's standard, the DHS has not proved by clear and convincing evidence that Mr. Lewis is removable for falsely claiming U.S. citizenship because the DHS did not *unequivocally* show that Mr. Lewis marked the corresponding box on his Form I-9 with the purpose of representing himself as a citizen.

The Tenth Circuit lines up somewhere between the Fourth and Eighth Circuits. In *Kechkar v. Gonzales*, the Tenth Circuit upheld the BIA's determination that an alien falsely claimed U.S. citizenship where the alien checked the "citizen or national of the United States" box on Form I-9. *Kechkar v. Gonzales*, 500 F.3d 1080 (10th Cir. 2007). When the alien asserted that there was no evidence indicating that he meant to claim citizenship rather than nationality, the Tenth Circuit responded that it was the alien's burden "to show that he intended to claim status as a national." *Kechkar v. Gonzales*, 500 F.3d at 1085.

In the case at bar, Mr. Lewis neither admitted nor denied the charge of falsely claiming U.S. citizenship. Furthermore, instead of holding a

hearing on whether Mr. Lewis was removable under 8 U.S.C. § 1227(a)(3)(D), the IJ skipped straight to Mr. Lewis's applications for relief from removal and his waivers of inadmissibility. Thus, the IJ denied Mr. Lewis his right to procedural due process by denying him an opportunity to be heard with regard to this charge. Because Mr. Lewis was never provided an opportunity to show that he intended to claim status as a national, the Tenth Circuit's holding in *Kechkar* is inapposite here.

Finally, the Fifth Circuit's decision in *Theodros v. Gonzales* is worth mentioning because, in a footnote, it attempted to distinguish the Ninth Circuit's holding in *Karaouni* by noting the statutory language of 18 U.S.C. § 911 requires a "willful" misrepresentation of U.S. citizenship. *Theodros v. Gonzales*, 490 F.3d 396, 402 n. 7 (5th Cir. 2007). However, as the alien in *Theodros* admitted under oath at a hearing that "he had falsely claimed citizenship in order to obtain employment before securing a work permit," the facts of *Theodros* are distinguishable from the case at bar. *Theodros*, 490 F.3d at 400. Therefore, as Mr. Lewis never claimed under oath that he had falsely claimed U.S. citizenship for the purpose of obtaining private employment, this Court should reverse the Fourth Circuit's decision finding him removable under 8 U.S.C. § 1227(a)(3)(D).

II. Mr. Lewis Exhausted His Administrative Remedies Before Seeking Judicial Review of the Board of Immigration Appeals' Decision before the United

States Court of Appeals for the Fourth Circuit

In its January 29, 2008 decision, the Fourth Circuit erred in finding that Mr. Lewis failed to exhaust his administrative remedies with respect to the charge of falsely claiming U.S. citizenship by failing to contest this ground of removability on appeal before the BIA. In accordance with its erroneous finding, the Fourth Circuit cited 8 U.S.C. § 1252(d)(1) in support of its claim that it lacked jurisdiction to review an unexhausted claim. Specifically, in his brief to the BIA, Mr. Lewis argued that he neither admitted nor denied the charge of removability as alien that had falsely claimed U.S. citizenship. Mr. Lewis went on to implicitly argue that by merely submitting a copy of his Form I-9, the DHS failed to show by clear, unequivocal, and convincing evidence that he had falsely claimed U.S. citizenship and was therefore removable under 8 U.S.C. § 1227(a)(3)(D). Thus, in light of the fact that Mr. Lewis raised this charge of removability on appeal to the BIA, this Court should reverse the Fourth Circuit's erroneous conclusion that he failed to exhaust his administrative remedies.

Assuming *arguendo*, however, that Mr. Lewis did in fact fail to exhaust his administrative remedies, the Fourth Circuit has committed legal error in finding that it lacked jurisdiction to entertain his claim. In *McCarthy v. Madigan*, this Court instructed the lower courts that they may review a final order of removal, despite a petitioner's failure to exhaust administrative remedies, if the

"individual's interest in retaining prompt access to a federal judicial forum" outweighed the "countervailing institutional interests favoring exhaustion." *McCarthy v. Madigan*, 503 U.S. 140 (1992). An individual's interests will outweigh the interests in requiring exhaustion if the "administrative remedy may occasion undue prejudice to subsequent assertion of a court action" or there is a "challenge to the adequacy of the administrative remedy" or "the administrative body is shown to be biased or otherwise predetermined the issue before it." *See Gibson v. Berryhill*, 411 U.S. 564, 575 (1973).

In the instant case, Mr. Lewis's interests in retaining prompt access to this Court outweigh the institutional interests favoring exhaustion. Here, Mr. Lewis asserts that the inadequacy of the procedure itself violated his rights to due process. Specifically, Mr. Lewis asserts that the IJ and the BIA denied him procedural due process by finding that the DHS proved by clear and convincing evidence that he falsely claimed U.S. citizenship merely by submitting a copy of his Form I-9. At the proceedings, the IJ seemed to find the DHS' submission of Mr. Lewis's Form I-9 sufficient to sustain the charge of falsely claiming U.S. citizenship under 8 U.S.C. § 1227(a)(3)(D). Later, the IJ conceded that the Form I-9 may not be sufficient to sustain the charge. Ultimately, the IJ appeared to base his decision on the facts that Mr. Lewis had checked the "citizen or national of the United States" box on Form I-9 and that Mr. Lewis had also submitted a forged U.S. passport. Mr.

Lewis asserts that it was improper for the IJ to rely on the passport because it was wholly outside the factual allegation submitted in support of the charge of falsely claiming U.S. citizenship, and without amending the charge's factual basis, Mr. Lewis was denied a fair opportunity to defend against it.

Assuming *arguendo*, however, that it was proper to rely on the passport, Mr. Lewis asserts that there is sufficient doubt as to whether the passport was submitted as part of an attempt to falsely claim citizenship. Indeed, Mr. Lewis clarified that the passport was not a U.S. passport, but rather a Grenada passport. This statement was bolstered by the fact that it was wholly different in appearance from U.S. passports, and used the French language throughout its contents. Finally, Mr. Lewis noted that his employer clearly knew that he was not a U.S. citizen, and therefore anything he submitted to his employer clearly could not be held to constitute a representation of U.S. citizenship.

Thus, the thrust of his argument centers on the IJ's and the BIA's inability to meet the constitutional requirements of due process. To expect the BIA to rule to rule on the adequacies of its own proceedings is contrary to the doctrine of judicial review. *See generally Landon v. Plasencia*, 459 U.S. 21 (1982). Moreover, the BIA cannot rule on whether it afforded Mr. Lewis due process without being biased against him and leading to a greater deprivation of his constitutional rights. *See generally Barry v. Barchi*, 443 U.S. 55 (1979). Accordingly, Mr. Lewis could not be expected to exhaust his administrative remedies before the BIA

when he challenged the adequacy of its proceedings.

Therefore, this Court should find that Mr. Lewis exhausted his administrative remedies, or, in the alternative, was not required to exhaust them, before seeking judicial review of the BIA's decision before the Fourth Circuit. Therefore, this Court should remand this case to the Fourth Circuit, directing it to find jurisdiction over Mr. Lewis's claim challenging his removability under 8 U.S.C. § 1227(a)(3)(D), and to enter a judgment reflecting the fact that the DHS failed to prove by clear and convincing evidence that Mr. Lewis is removable for falsely claiming U.S. citizenship.

III. Mr. Lewis Showed the Requisite Prejudice Resulting from a Procedural Due Process Violation Because the Immigration Judge's Preclusion of Evidence Negatively Impacted the Results of the Proceeding

Citing *Rusu v. INS*, the Fourth Circuit erred by finding that Mr. Lewis could not succeed with his procedural due process claim because he failed to show the requisite prejudice resulting from the alleged error. *See Rusu v. INS*, 296 F.3d 316, 320-21 (4th Cir. 2002) (court may only find prejudice when the rights of an alien have been transgressed in such a way as is likely to impact the results of the proceedings). In his petition for review, Mr. Lewis asserted that the IJ violated his right to due process by precluding the presentation of evidence regarding his challenge to his removability as an alien that

falsely claimed U.S. citizenship as well as his rehabilitation concerning his attempt to obtain a 8 U.S.C. § 1182(h) waiver and adjust his status to that of a legal permanent resident.

In determining the constitutional sufficiency of removal proceedings, the courts have relied on the three-factor test laid down in *Matthews v. Eldridge*, which considers (1) the interest at stake for the individual; (2) the risk of an erroneous deprivation of the interest through the procedures used and the probable value of additional procedural safeguards; and (3) the government's interest in avoiding the potential burdens that the additional or substitute procedure would entail. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

As a threshold matter, then, the Fourth Circuit recognized that the IJ and the BIA denied Mr. Lewis's right to due process. The only issue remaining, therefore, is whether the government's decision to preclude Mr. Lewis from presenting evidence in defense of his removability as an alien that falsely claimed U.S. citizenship and in support of his application for adjustment of status and a waiver of his other grounds of inadmissibility likely impacted the results of the proceedings.

The government will likely argue that as Mr. Lewis was found to have falsely claimed U.S. citizenship, and there is no waiver for this ground of removability, denying evidence in support of his application for a 8 U.S.C. § 1182(h) waiver likely did not impact the results of the proceedings. This argument would be misguided, however, in light of the Fourth Circuit's implicit finding that the conduct

of the proceedings was constitutionally inadequate. Thus, Mr. Lewis's evidence in support of his application to adjust his status and obtain a 8 U.S.C. § 1182(h) waiver grows increasingly important when it is noted that the government found Mr. Lewis to have falsely claimed U.S. citizenship in a constitutionally inadequate proceeding. At the 2005 hearings, Mr. Lewis and his U.S. citizen family were prepared to testify regarding his charge of removability under 8 U.S.C. § 1227(a)(3)(D), his application for adjustment of status under 8 U.S.C. § 1255, and his application for a waiver of his other grounds of inadmissibility under 8 U.S.C. § 1182(h). The IJ, however, never held a hearing to consider the additional evidence Mr. Lewis and his family were prepared to provide. Mr. Lewis and his family were also prepared to present additional evidence of his rehabilitation as well as the extreme hardship his U.S. citizen family would face if he were removed from the United States. Mr. Lewis was also prepared to submit additional documentary evidence to corroborate his claims, such as his income tax returns and affidavits in support of his application executed by his U.S. citizen wife and a clinical psychologist (detailing the extreme hardship his family would face if Mr. Lewis were removed to Grenada). Although the IJ failed to properly consider this evidence, the evidence established that a favorable exercise of discretion was warranted. Moreover, Mr. Lewis's contributions to the community, his volunteer activities as a soccer coach, his good employment record, and his community ties all justified the favorable exercise of discretion.

Thus, the preclusion of this evidence likely impacted the outcome of the proceedings, and met the Fourth Circuit's standard as set forth in *Rusu*.

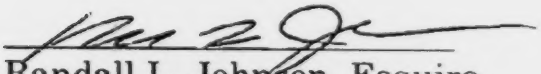
Pursuant to the *Matthews* test, the interest at stake for an individual alien in removal proceedings is very high, especially for one whose U.S. citizen family would suffer extreme hardship. The risk of an erroneous deprivation by not allowing testimony and evidence is very high, and the probable value of additional procedural safeguards, such as allowing testimony and additional evidence to be presented, is also very high. The government's interest in avoiding the potential burdens that the additional procedures would entail is relatively low in light of the fact that procedures for admitting testimony and evidence are well known and used in the judicial system.

Thus, by denying Mr. Lewis the ability to present new arguments and evidence as to both his charge as removable for falsely claiming U.S. citizenship as well as the extreme hardship his family would face if he were not granted adjustment of status and the necessary corresponding waiver, the IJ and the BIA denied Mr. Lewis's constitutional right to due process, and this denial likely affected the outcome of the proceedings. Therefore, as this denial prejudiced the IJ's and the BIA's decision in his case, the Fourth Circuit erred in finding that Mr. Lewis failed to show the requisite prejudice for his procedural due process claim to succeed, and this Court should exercise its supervisory authority to correct this constitutional error.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,



Randall L. Johnson, Esquire
Counsel of Record
JOHNSON & ASSOCIATES, P.C.
1916 Wilson Boulevard, Suite 203
Arlington, Virginia 22201
Telephone (703) 516-4400
Facsimile (703) 516-9089
RL.Johnson@verizon.net

August 17, 2008

APPENDIX A

FILED: May 19, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1328

(A76-594-192)

ELVIS DAVID LEWIS

Petitioner

v.

MICHAEL B. MUKASEY, Attorney General

Respondent

ORDER

The Court denies the petition for rehearing.

Entered at the direction of the panel: Judge Motz, Judge Duncan and Senior Judge Hamilton.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX B

FILED: January 29, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1328

(A76-594-192)

ELVIS DAVID LEWIS

Petitioner

v.

MICHAEL B. MUKASEY, Attorney General

Respondent

JUDGMENT

In accordance with the decision of this Court, the petition for review is dismissed in part and denied in part.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ Patricia S. Connor, Clerk

PER CURIAM:

Elvis David Lewis, a native and citizen of Grenada, petitions for review of an order of the Board of Immigration Appeals (Board) dismissing Lewis's appeal of the Immigration Judge's decision denying relief from removal. Lewis first challenges the finding that he is removable for falsely claiming United States citizenship, and asserts that the Board erred in finding that he never contested this ground of removability on appeal. Our review discloses that Lewis in fact failed to exhaust administrative remedies with respect to this claim by raising it on appeal to the Board of Immigration Appeals. As such, we lack jurisdiction to review this unexhausted claim. See 8 U.S.C. § 1252(d)(1) (2000). Next, Lewis asserts that his right to due process was violated when the Immigration Judge precluded the presentation of evidence of rehabilitation at the 2005 hearings concerning Lewis's attempt to adjust his status. We find that Lewis cannot succeed with this due process claim because he fails to show the requisite prejudice resulting from the alleged error. See Rusu v. INS, 296 F.3d 316, 320-21 (4th Cir. 2002).

Accordingly, we dismiss in part and deny in part the petition for review. We deny Lewis's motion to reconsider the denial of his motion to remand. Finally, we dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

PETITION D SMISSED IN PART;
DENIED IN PART

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A76 594 192 - Arlington Date: MAR 22 2007

In re: Elvis David Lewis

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Randall L. Johnson, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] - In the United States in violation of law

Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] - Convicted of two or more crimes involving moral turpitude

Sec. 237(a)(2)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(iii)] - Convicted of an aggravated felony

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of a controlled substance violation

Sec. 237(a)(2)(E)(i), I&N Act [8 U.S.C. § 1227(a)(2)(E)(i)] - Convicted of crime of domestic violence, stalking, child abuse, neglect, or abandonment

Lodged: Sec. 237(a)(3)(D), I&N Act [8 U.S.C. § 1227(a)(3)(D)] - False claim of United States citizenship

APPLICATION: Adjustment of status; waiver of inadmissibility under section 212(h); cancellation of removal under section 240A(b); voluntary departure; remand

ORDER:

PER CURIAM. The appeal is dismissed and the motion to remand is denied. The respondent has appealed from the September 12, 2005, decision of the Immigration Judge. In a prior decision dated June 25, 2002, the Immigration Judge has found the respondent removable as charged, and had denied his requests for relief from removal. Although the respondent had appealed from the 2002 decision, his appeal was withdrawn. *See* BIA order dated Sept. 10, 2002. The Immigration Judge granted the respondent's motion to reconsider and

administratively closed the proceedings by order dated March 24, 2003. The case was recalendared on May 7, 2004, and hearings were held on the respondent's eligibility for adjustment of status under section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255, based on an approved visa petition as the spouse of a United States citizen. In his September 12, 2005, decision, the Immigration Judge ultimately found the respondent statutorily ineligible for a waiver of inadmissibility based on his false claim of United States citizenship, and denied the waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), and the application for adjustment of status. He also denied the requests for cancellation of removal under section 240A(b) of the Act, 8 U.S.C. § 1229b(b), and for voluntary departure under section 240B of the Act, 8 U.S.C. § 1229c.

On appeal the respondent contests the Immigration Judge's denial of the requested relief except for cancellation of removal. He argues that he is eligible for a waiver of inadmissibility under section 212(h) of the Act due to the passage of time since his convictions and in light of the extreme hardship to his United States citizen wife and family if he is removed from the United States. The respondent, however, fails to address the Immigration Judge's finding that he is ineligible to seek a waiver of the charge of false claim of United States citizenship. The respondent has never contested on appeal the Immigration Judge's finding that he is removable as charged under section 237(a)(3)(D) of the Act, 8 U.S.C. § 1227(a)(3)(D).

Even if he were deserving of the section 212(h) waiver to absolve certain charges of removability, the respondent would still be unable to waive the charge of false claim of United States citizenship. *See* Sept. 12, 2005, I.J. at 3; June 25, 2002, I.J. at 7. The respondent, without the waivers, is ineligible to adjust his status. We, therefore, do not find that the Immigration Judge erred in precluding the presentation of evidence of rehabilitation at the 2005 hearings. Moreover, the respondent conceded the charge of removability as being convicted of an aggravated felony and is statutorily ineligible for voluntary departure. *See* June 25, 2002, I.J. at 2; Sept. 12, 2005, I.J. at 3-4. Thus, there is no need to remand the record to the Immigration Judge for further proceedings. Accordingly, the appeal is dismissed and the motion to remand is denied.

/s/ Roger Pauley
FOR THE BOARD

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
United States Immigration Court
901 North Stuart Street, Suite 1300
Arlington, Virginia 22203

IN THE MATTER OF:	)	IN REMOVAL
	)	PROCEEDINGS
LEWIS, Elvis David	)	
	)	**File No.:** A#76-594-192
Respondent	)	
	)	

CHARGES:

Section 237(a)(2)(A)(ii) of the Immigration and Nationality Act (INA or Act), as amended, as an alien who at any time after admission, has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

Section 237(a)(2)(A)(iii) of the Act, as amended, as an alien who at any time after admission, has been convicted of an aggravated felony as defined in section 101(a)(43)(B) of the Act.

Section 237(a)(2)(B)(i) of the Act, as amended, as an alien who at any time after admission, has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802), other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

Section 237(a)(2)(E)(i) of the Act, as amended, as an alien who at any time after entry, has been convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment.

Section 237(a)(3)(D) of the Act, as amended, as an alien who falsely represented himself to be a citizen of the United States for any purpose or benefit under this Act or any federal or state law.

Section 237(a)(1)(B) of the Act, as amended, as an alien who has

remained in the United States for a time longer than permitted.

APPLICATIONS: Waiver of inadmissibility pursuant to INA Section 212(h)
Adjustment of Status, pursuant to INA § 245;
Cancellation of removal pursuant to240A(b); and
Voluntary departure, pursuant to INA §240(B)(b).

APPEARANCES

ON BEHALF OF RESPONDENT;	ON BEHALF OF THE DHS:
Randall L. Johnson Esquire Johnson & Assoc., P.C. 1916 Wilson Blvd. Suite 203 Arlington, Virginia 22201	Assistant Chief Counsel Department of Homeland Security 901 N. Stuart Street Suite 1307 Arlington, Virginia 22203

DECISION AND ORDER

Respondent is a male, native and citizen of Grenada. Respondent was admitted to the United States at or near New York, New York, on or about February 1981 as a visitor for business with permission to remain in the United States for one month. Respondent has remained in the United States beyond this authorized period of admission without authorization. The Department of Homeland

Security (DHS)[1] filed a Notice to Appear (NTA) dated October 7, 1999, which was filed with the Immigration Court on October 12, 1999. The DHS filed Additional Charges on Inadmissibility/Deportability (Form I-261), dated November 4, 1999, with the Court on November 11, 1999. The DHS alleges that Respondent was convicted in the Circuit Court of Anne Arundel County, Maryland, on or about May 23, 1984, for the offense of Conspiracy with the Intent and Purpose to Commit Possession of Marijuana with the Intent to Distribute, in violation of the controlled dangerous substance laws. Respondent was sentenced to three years of imprisonment. The DHS also asserts that Respondent was convicted of Domestic Assault on or about December 8, 1994, and on or about March 7, 1997, in the General District Court of Stafford County, Virginia. The DHS also charges that Respondent was convicted on or about September 15, 1998, in the Circuit Court of Fairfax County, Virginia, of the offense of felonious embezzlement in violation of Section 18.2-111 of the Virginia Code and sentenced to 180 days imprisonment. Additionally, the DHS alleges that Respondent, on or about July 15, 1997, in seeking and obtaining employment, falsely represented himself as a citizen of the United States.

---

[1] On March 1, 2003, the INS became part of the Department of Homeland Security (DHS). Homeland Security Act of 2002, Pub.L.No. 107-296, Title IV, 116 Stat. 2135 (Nov. 25, 2002), as amended.

After a hearing concerning Respondent's eligibility for relief, this Court issued a written decision on June 25, 2002. In its Order, this Court found the charges on the NTA sustained and denied all relief. Respondent's false claim to United States citizenship made him ineligible for a 212(h) waiver.

On July 25, 2002, Respondent filed a motion to reconsider with the Court, which was granted. Respondent requested the opportunity to apply for withholding of removal and relief under the Convention Against Torture. Respondent filed an I-589 Application for Asylum and/or Withholding of Removal with the Court on or about June 9, 2000. The Court took discretionary testimony during proceedings regarding Respondent's asylum claim. However, Respondent is not pursuing this form of relief in these proceedings, and the Court will not adjudicate this issue. Currently, Respondent seeks to adjust his status based on an approved visa petition based on his marriage to his United States citizen [wife]. Respondent's original request to adjust status was based on his United States citizen daughter. As his current request for relief is similar to his original request to adjust status, this Court will again deny all relief.

LEGAL ANALYSIS

A. Adjustment of Status and Section 212(h) Waiver

As relief from removal, Respondent seeks adjustment

of status pursuant to INA § 245. To be eligible for adjustment of status, Respondent must demonstrate that he is admissible. In its written decision, this Court sustained the removability charge under INA Section 237(a)(3)(D) as an alien who falsely represented himself to be a United States citizen for any purpose or any benefit under the Act, or any federal or state law. This is also a ground of inadmissibility under INA Section 212(a)(6)(C)(ii)(I). Respondent seeks to waive his inadmissibility under INA Section 212(a)(6)(C)(ii)(I). In fact, the INA provides no waiver at all for this charge of inadmissibility. Respondent is statutorily ineligible to adjust status because he is inadmissible and is not eligible for a section 212(h) waiver.

2. Cancellation of Removal pursuant to INA Section 240A(b)

As relief from removal, Respondent seeks cancellation of removal as a nonpermanent resident alien who is removable. To be statutorily eligible for this form of cancellation of removal, Respondent must demonstrate that: A) he has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the dates of such application; B) has been a person of good moral character for such a period; C) he has not been convicted of an offense under section 212(a)(2), 237(a)(2) or 237(a)(3); and D) he can establish that removal would result in exceptional and extremely unusual hardship to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully

admitted for permanent residence. INA § 240(A)(b)(1). In addition to satisfying the four statutory eligibility requirements, an applicant for cancellation of removal must demonstrate that he warrants such relief as a matter of discretion. See Matter of C-V-T-, 22 I&N Dec. 7 (BIA 1998); see also Matter of Buffalino, 11 I&N Dec. 351 (BIA 1995); 8 C.F.R. § 1240.8. The Court finds that Respondent is ineligible fo cancellation of removal, as he does not meet the statutory requirements. Respondent has not been a person of good moral character. Pursuant to Section 101(f)(8) of the Act, no person shall be regarded as having good moral character if, at any time, he has been convicted of an aggravated felony. This Court sustained the aggravated felony charge against Respondent under 101(a)(43)(B) for his drug conviction. Further, Respondent has been found removable under INA Section 237(a)(3)(D), also making him ineligible for cancellation of removal. See INA Section 240A(b)(1)(C).

3. Voluntary Departure

A grant of voluntary departure pursuant to INA § 240B(b) is appropriate if (A) the alien has been present in the United States for the year before the NTA was served; (B) the alien has been a person of good moral character for the five years prior to the alien's application for voluntary departure; (C) the alien is not an aggravated felon or a danger to the United States; and (D) the alien has demonstrated by clear and convincing evidence that he has both the means and intent to depart from the United

States. See INA § 240B(b)(1).

Respondent is statutorily ineligible for voluntary departure because Respondent is an aggravated felon. Accordingly, after a careful review of the record, the Court enters the following order.

ORDER

It is ordered that: Respondent's application for a waiver of inadmissibility under INA Section 212(h) waiver be **DENIED.**

It is Further Ordered that: Respondent's application for adjustment of status pursuant to INA § 245 be **DENIED.**

It is Further Ordered that: Respondent's application for cancellation of removal, pursuant to INA § 240A(b) be **DENIED.**

It is Further Ordered that: Respondent's application for voluntary departure, pursuant to INA Section 240B(b) be **DENIED.**

It is Further Ordered that: Respondent be **REMOVED** to Grenada pursuant to the charges contained in his Notice to Appear.

9/12/05
Date

/s/ John Milo Bryant
John Milo Bryant
United States Immigration Judge

APPENDIX E

8 U.S.C. § 1182(h):

(h) Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E)

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) of this section and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if—

(1)

(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that—

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; or
(C) the alien is a VAWA self-petitioner;

and

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7

years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

APPENDIX F

8 U.S.C. § 1227(a)(3)(D):

> **(D) Falsely claiming citizenship**
> (i) In general Any alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1324a of this title) or any Federal or State law is deportable.
> (ii) Exception In the case of an alien making a representation described in clause (i), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be deportable under any provision of this subsection based on such representation.

APPENDIX G

8 U.S.C. § 1252(d)(1):

> **(d) Review of final orders**
> A court may review a final order of removal only if—
>
> (1) the alien has exhausted all administrative remedies available to the alien as of right

APPENDIX H

8 U.S.C. § 1255:

(a) Status as person admitted for permanent residence on application and eligibility for immigrant visa

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if

(1) the alien makes an application for such adjustment,
(2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and
(3) an immigrant visa is immediately available to him at the time his application is filed.

(b) Record of lawful admission for permanent residence; reduction of preference visas

Upon the approval of an application for adjustment made under subsection (a) of this section, the Attorney General shall record the alien's lawful admission for permanent

residence as of the date the order of the Attorney General approving the application for the adjustment of status is made, and the Secretary of State shall reduce by one the number of the preference visas authorized to be issued under sections 1152 and 1153 of this title within the class to which the alien is chargeable for the fiscal year then current.

(c) Alien crewmen, aliens continuing or accepting unauthorized employment, and aliens admitted in transit without visa

Other than an alien having an approved petition for classification as a VAWA self-petitioner, subsection (a) of this section shall not be applicable to

(1) an alien crewman;

(2) subject to subsection (k) of this section, an alien (other than an immediate relative as defined in section 1151 (b) of this title or a special immigrant described in section 1101 (a)(27)(H), (I), (J), or (K) of this title) who hereafter continues in or accepts unauthorized employment prior to filing an application for adjustment of status or who is in unlawful immigration status on the date of filing the application for adjustment of status or who has failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States;

(3) any alien admitted in transit without visa under section 1182 (d)(4)(C) of this title;
(4) an alien (other than an immediate relative as defined in section 1151 (b) of this title) who was admitted as a nonimmigrant visitor without a visa under section 1182 (l) of this title or section 1187 of this title;
(5) an alien who was admitted as a nonimmigrant described in section 1101 (a)(15)(S) of this title,[1]
(6) an alien who is deportable under section 1227 (a)(4)(B) of this title;
(7) any alien who seeks adjustment of status to that of an immigrant under section 1153 (b) of this title and is not in a lawful nonimmigrant status; or
(8) any alien who was employed while the alien was an unauthorized alien, as defined in section 1324a (h)(3) of this title, or who has otherwise violated the terms of a nonimmigrant visa.

(d) Alien admitted for permanent residence on conditional basis; fiancee or fiance of citizen

The Attorney General may not adjust, under subsection (a) of this section, the status of an alien lawfully admitted to the United States for permanent residence on a conditional basis under section 1186a of this title. The Attorney General may not adjust, under subsection (a) of this section, the status of a nonimmigrant

alien described in section 1101 (a)(15)(K) of this title except to that of an alien lawfully admitted to the United States on a conditional basis under section 1186a of this title as a result of the marriage of the nonimmigrant (or, in the case of a minor child, the parent) to the citizen who filed the petition to accord that alien's nonimmigrant status under section 1101 (a)(15)(K) of this title.

(e) Restriction on adjustment of status based on marriages entered while in admissibility or deportation proceedings; bona fide marriage exception

(1) Except as provided in paragraph (3), an alien who is seeking to receive an immigrant visa on the basis of a marriage which was entered into during the period described in paragraph (2) may not have the alien's status adjusted under subsection (a) of this section.

(2) The period described in this paragraph is the period during which administrative or judicial proceedings are pending regarding the alien's right to be admitted or remain in the United States.

(3) Paragraph (1) and section 1154 (g) of this title shall not apply with respect to a marriage if the alien establishes by clear and convincing evidence to the satisfaction of the Attorney General that the marriage was entered into in good faith and in accordance with the

laws of the place where the marriage took place and the marriage was not entered into for the purpose of procuring the alien's admission as an immigrant and no fee or other consideration was given (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) for the filing of a petition under section 1154 (a) of this title or subsection (d) or (p) [2] of section 1184 of this title with respect to the alien spouse or alien son or daughter. In accordance with regulations, there shall be only one level of administrative appellate review for each alien under the previous sentence.

(f) Limitation on adjustment of status

The Attorney General may not adjust, under subsection (a) of this section, the status of an alien lawfully admitted to the United States for permanent residence on a conditional basis under section 1186b of this title.

(g) Special immigrants

In applying this section to a special immigrant described in section 1101 (a)(27)(K) of this title, such an immigrant shall be deemed, for purposes of subsection (a) of this section, to have been paroled into the United States.

(h) Application with respect to special immigrants

In applying this section to a special immigrant described in section 1101 (a)(27)(J) of this

title—

(1) such an immigrant shall be deemed, for purposes of subsection (a) of this section, to have been paroled into the United States; and

(2) in determining the alien's admissibility as an immigrant—

(A) paragraphs (4), (5)(A), and (7)(A) of section 1182 (a) of this title shall not apply, and

(B) the Attorney General may waive other paragraphs of section 1182 (a) of this title (other than paragraphs (2)(A), (2)(B), (2)(C) (except for so much of such paragraph as related to a single offense of simple possession of 30 grams or less of marijuana), (3)(A), (3)(B), (3)(C), and (3)(E)) in the case of individual aliens for humanitarian purposes, family unity, or when it is otherwise in the public interest.

The relationship between an alien and the alien's natural parents or prior adoptive parents shall not be considered a factor in making a waiver under paragraph (2)(B). Nothing in this subsection or section 1101 (a)(27)(J) of this title shall be construed as authorizing an alien to apply for admission or be admitted to the United States in order to obtain special immigrant status described in such section.

(i) Adjustment in status of certain aliens physically present in United States

(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States—

(A) who—

(i) entered the United States without inspection; or

(ii) is within one of the classes enumerated in subsection (c) of this section;

(B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 1153 (d) of this title) of—

(i) a petition for classification under section 1154 of this title that was filed with the Attorney General on or before April 30, 2001; or

(ii) an application for a labor certification under section 1182 (a)(5)(A) of this title that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and

(C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on December 21, 2000;

may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien remits with such application a sum equalling $1,000 as of the date of receipt of the application, but such sum shall not be required from a child under the age of seventeen, or an alien who is the spouse or unmarried child of an individual who obtained temporary or permanent resident status under section 1160 or 1255a of this title or section 202 of the Immigration Reform and Control Act of 1986 at any date, who—

(i) as of May 5, 1988, was the unmarried child or spouse of the individual who obtained temporary or permanent resident status under section 1160 or 1255a of this title or section 202 of the Immigration Reform and

Control Act of 1986;
(ii) entered the United States before May 5, 1988, resided in the United States on May 5, 1988, and is not a lawful permanent resident; and
(iii) applied for benefits under section 301(a) of the Immigration Act of 1990. The sum specified herein shall be in addition to the fee normally required for the processing of an application under this section.

(2) Upon receipt of such an application and the sum hereby required, the Attorney General may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if—
(A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and
(B) an immigrant visa is immediately available to the alien at the time the application is filed.

(3)
(A) The portion of each application fee (not to exceed $200) that

the Attorney General determines is required to process an application under this section and is remitted to the Attorney General pursuant to paragraphs (1) and (2) of this subsection shall be disposed of by the Attorney General as provided in subsections (m), (n), and (o) of section 1356 of this title.

(B) Any remaining portion of such fees remitted under such paragraphs shall be deposited by the Attorney General into the Breached Bond/Detention Fund established under section 1356 (r) of this title, except that in the case of fees attributable to applications for a beneficiary with respect to whom a petition for classification, or an application for labor certification, described in paragraph (1)(B) was filed after January 14, 1998, one-half of such remaining portion shall be deposited by the Attorney General into the Immigration Examinations Fee Account established under section 1356 (m) of this title.

(j) Adjustment to permanent resident status

(1) If, in the opinion of the Attorney

General—

(A) a nonimmigrant admitted into the United States under section 1101 (a)(15)(S)(i) of this title has supplied information described in subclause (I) of such section; and

(B) the provision of such information has substantially contributed to the success of an authorized criminal investigation or the prosecution of an individual described in subclause (III) of that section,

the Attorney General may adjust the status of the alien (and the spouse, married and unmarried sons and daughters, and parents of the alien if admitted under that section) to that of an alien lawfully admitted for permanent residence if the alien is not described in section 1182 (a)(3)(E) of this title.

(2) If, in the sole discretion of the Attorney General—

(A) a nonimmigrant admitted into the United States under section 1101 (a)(15)(S)(ii) of this title has supplied information described in subclause (I) of such section, and

(B) the provision of such information has substantially

contributed to—

(i) the prevention or frustration of an act of terrorism against a United States person or United States property, or

(ii) the success of an authorized criminal investigation of, or the prosecution of, an individual involved in such an act of terrorism, and

(C) the nonimmigrant has received a reward under section 2708 (a) of title 22,the Attorney General may adjust the status of the

alien (and the spouse, married and unmarried sons and daughters, and parents of the alien if admitted under such section) to that of an alien lawfully admitted for permanent residence if the alien is not described in section 1182 (a)(3)(E) of this title.

(3) Upon the approval of adjustment of status under paragraph (1) or (2), the Attorney General shall record the alien's lawful admission for permanent residence as of the date of such approval and the Secretary of State shall reduce by one the number of visas authorized to be issued under sections 1151 (d) and 1153 (b)(4) of this title for

the fiscal year then current.

(k) Inapplicability of certain provisions for certain employment-based immigrants

An alien who is eligible to receive an immigrant visa under paragraph (1), (2), or (3) of section 1153 (b) of this title (or, in the case of an alien who is an immigrant described in section 1101 (a)(27)(C) of this title, under section 1153 (b)(4) of this title) may adjust status pursuant to subsection (a) of this section and notwithstanding subsection (c)(2), (c)(7), and (c)(8) of this section, if—

(1) the alien, on the date of filing an application for adjustment of status, is present in the United States pursuant to a lawful admission;

(2) the alien, subsequent to such lawful admission has not, for an aggregate period exceeding 180 days—

(A) failed to maintain, continuously, a lawful status;

(B) engaged in unauthorized employment; or

(C) otherwise violated the terms and conditions of the alien's admission.

(l) Adjustment of status for victims of trafficking

(1) If, in the opinion of the Secretary of Homeland Security, or in the case of subparagraph (C)(i), the Attorney General,,[3] a nonimmigrant

admitted into the United States under section 1101 (a)(15)(T)(i) of this title—

(A) has been physically present in the United States for a continuous period of at least 3 years since the date of admission as a nonimmigrant under section 1101 (a)(15)(T)(i) of this title, or has been physically present in the United States for a continuous period during the investigation or prosecution of acts of trafficking and that, in the opinion of the Attorney General, the investigation or prosecution is complete, whichever period of time is less; [4]

(B) has, throughout such period, been a person of good moral character, and

(C)(i) has, during such period, complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, or (ii) the alien would suffer extreme hardship involving unusual and severe harm upon removal from the United States, the Secretary of Homeland Security, or in the case of subparagraph (C)(i), the Attorney General, may adjust the status of the alien (and any

person admitted under section 1101 (a)(15)(T)(ii) of this title as the spouse, parent, sibling, or child of the alien) to that of an alien lawfully admitted for permanent residence.

(2) Paragraph (1) shall not apply to an alien admitted under section 1101 (a)(15)(T) of this title who is inadmissible to the United States by reason of a ground that has not been waived under section 1182 of this title, except that, if the Secretary of Homeland Security considers it to be in the national interest to do so, the Secretary of Homeland Security, in the Attorney General's [5] discretion, may waive the application of—

(A) paragraphs (1) and (4) of section 1182 (a) of this title; and

(B) any other provision of such section (excluding paragraphs (3), (10)(C), and (10(E)),[6] if the activities rendering the alien inadmissible under the provision were caused by, or were incident to, the victimization described in section 1101 (a)(15)(T)(i)(I) of this title.

(3) An alien shall be considered to have failed to maintain continuous physical presence in the United States under paragraph (1)(A) if the alien has

departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

(4)

(A) The total number of aliens whose status may be adjusted under paragraph (1) during any fiscal year may not exceed 5,000.

(B) The numerical limitation of subparagraph (A) shall only apply to principal aliens and not to the spouses, sons, daughters, siblings, or parents of such aliens.

(5) Upon the approval of adjustment of status under paragraph (1), the Secretary of Homeland Security shall record the alien's lawful admission for permanent residence as of the date of such approval.

(m) Adjustment of status for victims of crimes against women

(1) The Secretary of Homeland Security may adjust the status of an alien admitted into the United States (or otherwise provided nonimmigrant status) under section 1101 (a)(15)(U) of this title to that of an alien lawfully admitted for permanent residence if the alien is not described in section 1182 (a)(3)(E) of this title, unless the Attorney General determines based on

affirmative evidence that the alien unreasonably refused to provide assistance in a criminal investigation or prosecution, if—

(A) the alien has been physically present in the United States for a continuous period of at least 3 years since the date of admission as a nonimmigrant under clause (i) or (ii) of section 1101 (a)(15)(U) of this title; and

(B) in the opinion of the Secretary of Homeland Security, the alien's continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest.

(2) An alien shall be considered to have failed to maintain continuous physical presence in the United States under paragraph (1)(A) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days unless the absence is in order to assist in the investigation or prosecution or unless an official involved in the investigation or prosecution certifies that the absence was otherwise justified.

(3) Upon approval of adjustment of status under paragraph (1) of an alien

described in section 1101 (a)(15)(U)(i) of this title the Secretary of Homeland Security may adjust the status of or issue an immigrant visa to a spouse, a child, or, in the case of an alien child, a parent who did not receive a nonimmigrant visa under section 1101 (a)(15)(U)(ii) of this title if the Secretary considers the grant of such status or visa necessary to avoid extreme hardship.

(4) Upon the approval of adjustment of status under paragraph (1) or (3), the Secretary of Homeland Security shall record the alien's lawful admission for permanent residence as of the date of such approval.

APPENDIX I

18 U.S.C. § 911:

Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined under this title or imprisoned not more than three years, or both.